IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-553

AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN,
a Michigan Not for Profit Corporation,

and

RAMSAY COLLISION, INCORPORATED,
a Michigan Corporation,

Plaintiffs-Appellants,

vs.

RICHARD H. AUSTIN, Secretary of State
for the State of Michigan,

Defendant-Appellee.

On Appeal From the Supreme Court of the State of Michigan

MOTION TO DISMISS OR AFFIRM

FRANK J. KELLEY
Attorney General
State of Michigan

Robert A. Derengoski
Solicitor General

Edwin M. Bladen
Assistant Attorney General

Attorneys for Appellee

670 Law Building
525 West Ottawa
Lansing, Michigan 48913

(517) 373-1140

PRINTED BY SPEAKER-HINES AND THOMAS., INC., LANSING, MICHIGAN—1978

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

Michigan Page(s)

OTHER

CASES

Michigan

Federal

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. .....

AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN,
a Michigan Not for Profit Corporation,

and

RAMSAY COLLISION, INCORPORATED,
a Michigan Corporation,

Plaintiffs-Appellants,

vs.

RICHARD H. AUSTIN, Secretary of State for the State of Michigan,

Defendant-Appellee.

On Appeal From the Supreme Court of the State of Michigan

MOTION TO DISMISS OR AFFIRM

The Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the appeal from the final judgment of the Supreme Court of the State of Michigan which denied leave to appeal the final decision of the Court of Appeals of the State of Michigan be dismissed or affirmed on the ground that the argument is so insubstantial as to warrant no further argument.

I.

STATEMENT

A. Proceedings Below

Appellants' summary or concise statement of the case found in their jurisdictional statement at Pages 4 to 7 fairly summarizes the proceedings leading to the instant appeal.

B. Nature of This Appeal

This appeal involves the validity of the Michigan Motor Vehicle Service and Repair Act (1974 PA 300, as amended; MCLA 257.1301, *et seq*) to the extent that the act names the Secretary of State of the State of Michigan administrator and empowers that administrator to promulgate rules defining unfair and deceptive acts and practices, investigate violations of the act or rules, and adjudicate through the administrative process those violations.

The statute provides in Section 22 (MCLA 257.1322) that the administrator (the Secretary of State) may deny, suspend or revoke a registration, certificate or permit only after notice and an opportunity for a hearing.

The hearing and the proceedings involved therewith must be handled and conducted in accordance with Michigan's Administrative Procedures Act (1969 PA 306, as amended; MCLA 24.201, *et seq*), which provides in Chapters 4, 5 and 6 (MCLA 24.271- .... 306) extensive protections and procedural due process in contested cases, licensing hearings and ultimately judicial review of the agency actions. Notable

among those procedures there is included mechanisms whereby a licensee or respondent may object and have removed a hearing officer from the particular case because of bias or other disqualifications.

Appellants' contentions here as well as throughout the course of this litigation below are that the Michigan statute governing auto repair practices, because it alone authorizes the administrator to perform the various functions of rulemaking, investigations and adjudication, necessarily compels a conclusion that a person subject to the act is deprived of procedural due process. Appellants contend that the Appellee's mere status as the administrator of the statute is sufficient to deny procedural due process because the Appellee is empowered by statute to perform the enumerated functions, and thus cannot ever be honest or impartial.

II.

ARGUMENT

THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

The decisions of the Michigan Court of Appeals and the Supreme Court to deny leave therefrom are clearly correct. In *Withrow* v *Larkin*, 421 US 35; 95 S Ct 1456; 43 L Ed 2d 712 (1975), this Court concluded that a state administrative agency charged with the authority and responsibility to investigate and adjudicate alleged violations of the applicable statute did not "necessarily" create an unconstitutional risk of bias in administrative adjudication.

The Michigan Court of Appeals in rendering its decision in the matter below relied upon *Withrow* v *Larkin, supra*, as

the controlling expression by this Court of its views on the question now presented by Appellants. The Michigan Supreme Court has also in its decision relied upon *Withrow* v *Larkin, supra,* in rejecting the appeal of a state court judge who also contended that under Michigan law the combination of investigative and adjudicative roles created an "inherent" risk of bias. See, *In the Matter of Del Rio,* 400 Mich 665; 256 NW2d 727 (1977). This Court dismissed the appeal for want of a substantial federal question, 434 US 1029; 98 S Ct 759; 54 L Ed 2d 777 (1978).

The instant appeal is not unlike and is substantially equivalent to both *Withrow* v *Larkin, supra,* and *In the Matter of Del Rio, supra.* Here we have an administrative agency who investigates and adjudicates allegations of wrongdoing asserted to have been committed by persons subject to the agency's jurisdiction.

Appellants essentially argue that because the agency, the Michigan Secretary of State, is authorized to promulgate rules defining unfair and deceptive acts and practices in the motor vehicle repair business, this additional duty comingled with the investigative and adjudicative responsibilities has now arisen to a level overcoming the presumption of honesty and integrity in those serving as adjudicators. This argument results from the misconception advanced by Appellants that the terms "unfair and deceptive" are too inherently vague as to in effect permit the adjudicator to decide for himself what is a violation of law and what is not. That argument is without foundation or substance in both state and federal law.

In *Federal Trade Commission* v *Sperry & Hutchinson Co,* 405 US 233; 92 S Ct 898; 31 L Ed 2d 170 (1972), this Court recognized two important legal theorums in connection with this issue. First, that the concepts of unfair and deceptive

were not so inherently vague as to amount to a delegation of lawmaking powers to a federal administrative agency. Second, that the administrative agency itself is empowered to determine in appropriate contexts the extent of what by rule will constitute an unfair and deceptive act or practice, not being confined to some arbitrary standard such as "unfair methods of competition."

The State of Michigan by legislative action has in effect created a "little FTC" in the motor vehicle repair business in the Secretary of State.

The various states, like Michigan, have now turned their attention to unfair and deceptive trade practices, and, relying upon almost 70 years of federal experience and precedent, have adopted the same approach to such conduct. The state's reliance upon federal precedent now ought not form the basis for uncertainty in dealing with such measures.

The state act now in issue before this Court is one which forbids auto repairers from engaging in unfair and deceptive acts and practices and permits the administrative agency charged with enforcement to define what particular acts and practices in such a business will be unfair and deceptive. The terms are not vague.

As early as 1919, the Federal Trade Commission Act was attacked as vague and indefinite. Upholding an FTC order against Sears, Roebuck & Company, the United States Court of Appeals for the Seventh Circuit rejected the charge of vagueness, stating that the phrases "unfair methods of law," "unsound mind," "undue influence," "unfaithfulness," "unfair use," "unfit for cultivation," "unreasonable rate," and "scheme to defraud" can all be interpreted by the courts without need for a schedule of forbidden conduct.

If Michigan's auto repair law is to be effective to prevent improper conduct by mechanics and garagemen, enforcement officials must recognize that the act was not meant to provide precise definition to this area of the law. In fact, precise definition would be restrictive, and the officials would be unable to cope with new and ingenious conduct as is arises from time to time.

The Michigan courts have found it not so offensive to our constitution for the legislature to proscribe unfair and deceptive acts and practices in the auto repair business. And, Michigan's courts' decisions are consistent with and follow the lead of this Court's opinions from *Federal Trade Commission* v *R F Keppel & Bros, Inc*, 291 US 304; 54 S Ct 423; 78 L Ed 814 (1934), to *Federal Trade Commission* v *Sperry & Hutchinson & Co, supra*, (1972).

Appellants, then, are in effect asking this Court to take jurisdiction of this appeal in order to reexamine settled principles established in *R F Keppel & Bros, Inc*, and its progeny.

We think this inappropriate and that the precedent is legion establishing the insubstantiality of the arguments presented for consideration by the Appellants to this Court.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depends are so insubstantial a federal question as not to need further argument, and Appellee respectfully moves the Court to dismiss the appeal, or, in the alternative, to affirm the final judgment entered in the cause by the Supreme Court of the State of Michigan.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Edwin M. Bladen
Assistant Attorney General

Attorneys for Appellees

670 Law Building
525 West Ottawa
Lansing, Michigan 48913

(517) 373-1140

Dated: October 23, 1978